

September 26, 2011 Informal

Opinion 2011-6 DUTY TO REPORT PROFESSIONAL MISCONDUCT

The Committee has received an inquiry from a lawyer (the "Requesting Lawyer") representing a party in a dissolution of marriage proceeding where the spouse in the dissolution action is a partner in a law firm engaged in the general practice of law.

During the deposition of the managing partner of the law firm, it became evident by admission that the firm receives retainers in matrimonial matters and deposits these retainers into the firm's general operating account. Subsequent inquiry of the Requesting Lawyer resulted in the Requesting Lawyer's providing independent evidence that the firm in question deposited one client's retainer directly into its operating account, and that its retainer agreement with that client did not specifically authorize the law firm to deposit the retainer into the operating account instead of a segregated client trust account.

The Requesting Lawyer also reports that a forensic accounting examination of the firm's client trust account performed by the Requesting Lawyer's accountant¹ identified what the Requesting Lawyer terms "certain apparent irregularities" in the administration of the firm's client trust account, including payments from the account to cash, as well as to employees of the firm, partners in the firm, grandchildren of lawyers in the firm, and firm creditors. The Requesting Lawyer questions whether, pursuant to Rule 8.3 of the Rules of Professional Conduct, he has the duty to report "what [he] believes to be a violation of the ethical rules," and, if so, whether he may defer reporting until the dissolution matter is concluded to avoid any adverse impact on the lawyer's client.

Rule 8.3(a) provides, in pertinent part:

¹ The audit followed the court's in camera review of the account documents and order requiring their production.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a

lawyer in other respects, shall inform the appropriate professional authority.

Rule 1.15(d), RPC, provides: "(d) Absent a written agreement with the client otherwise, a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."

Connecticut Practice Book §2-27(a) provides:

(a) Consistent with the requirement of Rule 1.15 of the Rules of Professional Conduct, each lawyer or law firm shall maintain, separate from the lawyer's or the firm's personal funds, one or more accounts accurately reflecting the status of funds handled by the lawyer or firm as fiduciary or attorney, and shall not use such funds for any unauthorized purpose.

Connecticut Practice Book §2-27(f) provides: "(f) Violation of this section shall constitute misconduct."

We will assume, for purposes of this opinion, facts recited by the Requesting Lawyer, as follows: (1) that the subject law firm has deposited retainers into its operating account rather than its client trust account, and (2) that in at least one instance, such a deposit was made without a written agreement with its client to that effect. Based upon these assumptions, we conclude that the conduct described, of which the Requesting Lawyer has knowledge,² violates the express provisions of the Rules of Professional Conduct and our Rules of Practice, as referenced above, and raises a substantial question as to the identified lawyer's honesty, trustworthiness or fitness as a lawyer. The conduct, which implicates a lawyer's obligation properly to segregate and keep safe client funds, satisfies the threshold requirements of Rule 8.3(a).

² The Rules of Professional Conduct define "knowingly" and "knowledge," as well as "knows," the term used in Rule 8.3(a), as denoting "actual knowledge of the fact in question" which "may be inferred from circumstances." Rule 1.0(g).

³ As noted above, the Requesting Lawyer further reported that a forensic audit of the identified lawyer's client trust account revealed that certain checks drawn on the client funds account had been made payable to cash and to partners, partners' grandchildren, employees of the firm, and firm creditors. Rule 1.15(d) provides that legal fees and expenses that have been paid in advance and deposited into a lawyer's client trust account are "to be withdrawn by the lawyer only as fees are earned and expenses incurred." While the better practice with respect to such withdrawals is to transfer fees from a client trust account into the firm's operating account as they are earned, and then to make disbursements as appropriate from that account, we find no provision in the Rules of Professional Conduct or the Practice Book prohibiting lawyers from paying over fees earned (and therefore owed) directly from a client funds account to lawyers or others as long as the firm keeps detailed and accurate records of such disbursements. See Connecticut Practice Book § 2-27(b).

From the information provided, the Committee cannot determine whether, when the checks at issue were drawn, the amounts made payable to cash and to lawyers and other payees exceeded the aggregate fees earned by, and therefore owing to, the firm. The "irregularities" identified in the audit, however, would give rise to some concern even absent the firm's managing partner's admission that the firm deposits retainers into its operating account rather than its client funds account, and even

Under different circumstances, the Requesting Lawyer's knowledge of the identified lawyer's violation of the Rules of Professional Conduct would trigger Rule 8.3's reporting requirement. However, Rule 8.3 (c)

states, in pertinent part, that "[t]his Rule does not require disclosure of information otherwise protected by Rule 1.6" Because the information that establishes the violation is information related to the representation of the Requesting Lawyer's client in the dissolution action, Rule 1.6(a) protects it from disclosure unless the client provides her informed consent.

Rule 1.6(a) provides that "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d)." There is no indication that disclosure of the information at issue here is impliedly authorized to carry out the representation, nor do any of the exceptions set out in subsections (b)-(d) apply.

In a number of previous opinions (e.g, Informal Opinions 90-01, 94-01, 97-16 and 05-12), this Committee has noted that the scope of 1.6 is no longer limited to confidences and secrets of clients. Rather, "[t]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Commentary, Rule 1.6. Information gleaned about an adverse party in litigation falls under this rubric.

In Informal Opinion 90-31, where the requesting lawyer had knowledge that the subject lawyer had misappropriated client funds, then had drawn checks on his client funds and office accounts to make restitution to the client without depositing sufficient funds into those accounts to cover the checks, this Committee opined that the requesting lawyer had the requisite knowledge to report, "*if you* may disclose it to file a grievance complaint against [Lawyer] X" (emphasis supplied). The Committee also opined that the conduct at issue "raise[d] a substantial question of X's honesty, trustworthiness or fitness as a lawyer." However, the committee concluded that the lawyer could not report because "Rule 1.6(a) prohibits you from reporting [the subject lawyer] to the appropriate authority without the consent of [your client], which [your client] has refused to

absent independent, corroborating evidence that, in at least one instance, such deposit was made without a written agreement to that effect with the client. In that regard, we note that the Commentary to Rule 8.3 instructs that "[t]he term 'substantial' [in the Rule] refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

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give." The Committee pointed out that the requesting lawyer's knowledge of the subject lawyer's conduct "relates to the representation of [the lawyer's client]" and cited the Commentary to Rule 8.3 ("A report about

misconduct is not required where it would involve violation of Rule 1.6").

In Informal Opinion 94-30, on even more disturbing facts (the requesting lawyer gleaned knowledge of opposing counsel's instructions to his client to lie, under oath, in a dissolution proceeding from the requesting lawyer's own client's unauthorized audio taping of his wife's conversations, including conversations with her lawyer), this Committee likewise concluded, *inter alia*, that because "[t]he illegal source of the information regarding the wife's attorney was learned by the husband's attorney in the course of his representation of the husband. . . . absent consent by his client, the husband's attorney is required under the ethical duty of confidentiality to keep the contents of the taped conversations confidential."

These conclusions square with ABA Formal Opinion 04-433, which "explores a lawyer's duty under the Model Rules of Professional Conduct to report the misconduct of a licensed but non-practicing lawyer." The ABA opinion concludes that "a lawyer having knowledge of the professional misconduct of another lawyer, including a non-practicing lawyer," must report conduct "raising a substantial question about the lawyer's honesty, trustworthiness or fitness to practice law in other respects," but discusses at length Rule 1.6's limitations on that duty.

The ABA Standing Committee opines that "[r]ead together with Rule 8.3, [Rule 1.6(a)] means that, if a report of misconduct would reveal information relating to the representation of a client, a lawyer must obtain the client's informed consent before making such a report" and notes that, "[according to the Annotation to Rule 8.3, '[t]he duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6.'"

"Stated more bluntly," the Standing Committee concludes, "Rule 1.6 trumps Rule 8.3."

The Standing Committee points out, too, that "the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer."

We agree, and conclude that Rule 1.6 trumps Rule 8.3 in the instant case.

We turn next to the issue of obtaining informed client consent for the disclosure of confidential

information.

"Informed consent" is defined in the Rules of Professional Conduct as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(f). In framing the request for guidance transmitted to this Committee, the Requesting Lawyer has indicated that he anticipates that disclosure of the identified lawyer's professional misconduct will adversely impact the Requesting Lawyer's client's interests. That assessment is important in the ethical analysis.

"[The Commentary] to Rule 8.3 entreats a lawyer to 'encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.'" ABA Formal Opinion 04-433 (internal citations omitted). Moreover, the Commentary to Rule 8.3 posits that "[Reporting a violation is especially important where the victim is unlikely to discover the offense." However, as ABA Formal Opinion 04-433 cautions, "[a]ny discussion of consent to disclosure ... must include the potential adverse impact that disclosure may have on the client" Again, this Committee agrees, and concludes that, in seeking informed client consent for the disclosure at issue, the Requesting Lawyer must discuss with the client the risks associated with disclosure.

In sum, it seems plain to the Committee that the Requesting Lawyer's knowledge of the identified lawyer's violation of the Rule 1.15(a) and Connecticut Practice Book § 2-27(a), under different circumstances, would trigger the reporting requirement set forth in Rule 8.3. However, because the information on which any disciplinary report would be based is information related to the representation of the Requesting Lawyer's client in the dissolution action, the Committee concludes that the Requesting Lawyer may not ethically disclose the information without the client's "informed consent," as that phrase is defined in the Rules of Professional Conduct, and, further, that such informed consent requires "a discussion of the potential adverse impact that disclosure may have on the client."

THE COMMITTEE ON PROFESSIONAL ETHICS

By 